NO. 48409-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RORY MICKENS,

Appellant.

RESPONDENT'S BRIEF

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(2) Mickens waived his claim of misconduct when he did not object at trial;

(3) Mickens' attorney provided effective representation;

(4) The jury was properly instructed on reasonable doubt; and

(5) Because the State has not sought appellate costs, the appellate cost issue is not before this Court.

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III. STATEMENT OF THE CASE

Tony Campbell worked as a confidential informant for the Cowlitz Wahkiakum County Task Force for 13 years. RP (11/12/15) at 220. Campbell would conduct controlled buys by purchasing drugs with money provided to him by the task force for this purpose. RP (11/12/15) at 221. To avoid being killed, Campbell kept his work with the task force secret. RP (11/12/15) at 221.

In July of 2015, Rory Mickens was living at 1000 North 6th Avenue in Kelso. RP (11/12/15) at 222; (11/13/15) at 17. Mickens' girlfriend Tessa lived at the house with him. RP (11/12/15) at 233-34, 245. Campbell was familiar with Mickens' house, having stayed there a couple times. RP (11/12/15) at 223. However, Campbell did not live at Mickens' house. RP (11/12/15) at 223. Campbell informed the task force that he could buy drugs from Mickens. RP (11/12/15) at 223.

On July 14, 2015, Campbell met with task force Detective Jeff Brown near Mickens' house on 6th Avenue at the intersection of 5th or 6th and Burcham Street in Kelso. RP (11/13/15) at 74. Detective Brown searched Campbell at 2:50 p.m. RP (11/12/15) at 224. Brown's search of Campbell was thorough, and included his upper and lower body, all pockets, between his toes, and visual confirmation that Campbell was not wearing underwear. RP (11/13/15) at 74-75. Campbell did not have

drugs, money, or contraband on his person. RP (11/13/15) at 8. Detective Brown then provided Campbell with $40 to purchase drugs from Mickens. RP (11/13/15) at 8, 96. To maintain surveillance of Campbell, additional detectives were in place to observe him as he entered and exited Mickens' residence. RP (11/13/15) at 8-9.

At 3:01 p.m., Campbell exited Detective Brown's vehicle. RP (11/13/15) at 9. Detective Brown observed Campbell head toward Mickens' residence, until surveillance was turned over to task force Sergeant Kimber Yund. RP (11/13/15) at 10. Sgt Yund maintained observation of Campbell until he entered the stairs to Mickens' house at 3:03 p.m. RP (11/13/15) at 77, 98-99. Campbell did not exchange anything with anyone while observed. RP (11/13/15) at 97-98.

When Campbell entered the house, Mickens was in the bathroom. RP (11/12/15) at 225. Eventually, Campbell and Mickens had a conversation. RP (11/12/15) at 225. Campbell gave Mickens the $40, and Mickens retrieved a straw containing methamphetamine from a black backpack and provided it to Campbell. RP (11/12/15) at 225, 228; (11/13/15) at 13-14. After receiving the methamphetamine, Campbell remained and continued his conversation with Mickens to avoid suspicion. RP (11/12/15) at 226.

At 3:29 p.m., Campbell exited down the same stairway and Sgt Yund again was able to observe him. RP (11/13/15) at 77, 99. Sgt Yund observed Campbell exit and walk toward Detective Brown's location. RP (11/13/15) at 99. After exiting, Campbell did not pick up or drop anything. RP (11/13/15) at 99. Sgt Yund maintained surveillance of Campbell until he was picked up by Detective Brown. RP (11/13/15) at 99. Campbell met with Detective Brown at the school district office on Crawford Street and provided Detective Brown with the straw containing methamphetamine that he had purchased from Mickens. RP (11/12/15) at 227. After he provided the straw, Detective Brown searched Campbell again and found that he did not have any drugs, money, or contraband on him. RP (11/13/15) at 10-11.

One week later, on July 21, 2015, Campbell again met with Detective Brown to conduct a controlled buy. RP (11/13/15) at 14-15. They met at the same location as before. RP (11/13/15) at 15. At 1:02 p.m., Detective Brown searched Campbell and again found that he had nothing on him. RP (11/13/15) at 15. Detective Brown provided Campbell with $40. RP (11/13/15) at 16. At 1:13 p.m., Campbell exited Detective Brown's vehicle. RP (11/13/15) at 16. Detective Brown maintained observation of Campbell as he walked toward Mickens' residence at 1000 North 6th Avenue. RP (11/13/15) at 17. Sgt Yund

picked up surveillance of Campbell at 1:15 p.m. RP (11/13/15) at 17. Sgt Yund observed Campbell walking on Burcham Street. RP (11/13/15) at 100. No other people were around as Campbell walked up the stairs to Mickens' residence at 1:18 p.m. RP (11/13/15) at 79, 100.

Campbell first went to Mickens' room attached to the garage, but Mickens was not there. RP (11/12/15) at 228. Campbell then went into the house, where Mickens was shooting pool. RP (11/12/15) at 228. Again Campbell met with Mickens. RP (11/12/15) at 228. Mickens had the same black backpack with him by the pool table. RP (11/12/15) at 228. Campbell provided the $40 to Mickens. RP (11/12/15) at 228. Mickens took a bag of methamphetamine out of the backpack gave it to Campbell. RP (11/12/15) at 229; (11/13/15) at 20. Campbell again remained in the house and engaged in a conversation with Mickens. RP (11/12/15) at 229. Eventually, Campbell exited the house at 1:42 p.m. RP (11/12/15) at 229; (11/13/15) at 17.

Campbell walked back down the stairs and was observed by Sgt Yund, who continued to observe him until surveillance was picked up by Detective Brown. RP (11/13/15) at 100-01. While observed by Sgt Yund, Campbell did not pick up, drop, or exchange anything with anyone. RP (11/13/15) at 101. Campbell returned to Detective Brown's location. RP (11/13/15) at 18. Campbell provided Detective Brown with the bag of

methamphetamine that Mickens had provided him. RP (11/13/15) at 18. Detective Brown searched Campbell and found no additional drugs, money, or contraband on him. RP (11/13/15) at 19.

On July 29, 2015, the task force executed a search warrant on Mickens' residence. RP (11/13/115) at 24, 101. Prior to entering the house, detectives knocked on the door and announced "Police, search warrant," and they continued to make this announcement upon entering the house. RP (11/13/15) at 141-42. Detectives encountered several people at the residence. RP (11/13/15) at 30. While in the house, Detective Kim Moore loudly told occupants of the house to show their hands to ensure they were not armed. RP (11/13/15) at 142-43. Mickens came out of a room holding a crowbar. RP (11/13/15) at 144. After being told multiple times to put down the crowbar, Mickens did so. RP (11/13/15) at 145. Mickens was detained. RP (11/13/15) at 145.

After the residence was secured, the detectives began their search. RP (11/13/15) at 31. Detective Brown searched Mickens' room that was attached to the detached garage. RP (11/13/15) at 34; (11/12/15) at 222. On the outside of the door to Mickens' room was the name "Rory" with a skull and cross bones underneath it. RP (11/13/15) at 34. Inside the room was a sleeping area with pillows and bedding. RP (11/13/15) at 34, 38-39. Men's and women's clothing were found in the room. RP (11/13/15) at

34. A writing tablet with "Rory and Tessa" written on the outside was also found. RP (11/13/15) at 37. The room also had a workbench with shelves above and below it. RP (11/13/15) at 34. Numerous items of drug paraphernalia were on the shelves and workbench, including bongs, glass pipes with white residue, a box containing packages with unused syringes, and three digital scales. RP (11/13/15) at 35. One of these scales had a hinged lid that would open and close with a digital display. RP (11/13/15) at 35-36, 45; Exhibit 11.

Detective Brown opened the lid of the scale. RP (11/13/15) at 35-36; Exhibit 11. Inside the open scale, Detective Brown observed white, methamphetamine residue and a folded $20 bill. RP (11/13/15) at 35-36, 119; Exhibit 11. Detective Brown also located a spoon with heroin on it. RP (11/13/15) at 36, 122. Mickens was charged with two counts of delivery of a controlled substance for the deliveries on July 14 and 21, 2015, and two counts of possession of a controlled substance for the methamphetamine and heroin found in his room. CP at 1-3.

On February 4, 2015, retired Judge James Stonier swore an oath to Cowlitz Superior Court Judge Michel Evans, stating:

> I, JAMES J. STONIER swear that I will support the Constitution of the United States and the Constitution of the State of Washington, that I will faithfully discharge the duties of the office of Judge Pro Tempore to the best of my ability.

CP at 66. Consequently, Judge Evans entered an order in Cowlitz County Superior Court that approved Judge Stonier to sit as a judge pro tempore, in cases directed by the Court and approved by the parties. CP at 67. Judge Stonier was assigned to hear Mickens' case and the parties entered an agreement to have Judge Stonier hear the case as a judge pro tempore. CP at 64. Additionally, when this agreement was entered, Judge Stonier conducted a colloquy of Mickens to ensure that he was in agreement with the judge hearing his case. RP (11/12/15) at 3-4. Mickens orally agreed to have Judge Stonier hear his case as a judge pro tempore. RP (11/12/15) at 3-4. The case proceeded to trial.

At trial, Mickens' attorney elicited from Detective Brown that when detectives entered the house to execute the search warrant, Detective Moore encountered a person holding a crowbar. RP (11/3/15) at 89. Mickens' attorney also elicited from Detective Brown that in his report he had written that the person holding the crowbar was Jesse Wilson. RP (11/13/15) at 89. Detective Brown later explained that he had made a mistake when he wrote that Wilson was the person with the crowbar, and that the person Detective Moore had reported as holding the crowbar was Mickens. RP (11/13/15) at 90.

Despite having elicited Detective Moore's observation of a person holding the crowbar through Detective Brown, Mickens' attorney then attempted to prevent the State from having Detective Moore testify to her observation of Mickens' holding the crowbar. RP (11/13/15) at 135. Because Mickens put who was holding the crowbar at issue, the court permitted Detective Moore to state who she had seen holding the crowbar. RP (11/13/15) at 138. The court limited this evidence, and would not allow the State to elicit that Mickens had the crowbar raised above his head in a threatening manner. RP (11/13/15) at 136-38. Detective Moore testified to observing Mickens holding the crowbar when detectives entered the house on July 29, 2015. RP (11/13/15) at 140, 144.

During trial, Campbell testified to having worked as a confidential informant for the task force for 13 years conducting controlled buys. RP (11/12/15) at 220. Campbell explained that he never disclosed his participation in controlled buys, to avoid being killed. RP (11/12/15) at 221. Campbell never discussed his work for the task force with others. RP (11/12/15) at 244. Campbell was familiar with Mickens' home and had stayed there a couple of times, but did not live there. RP (11/12/15) at 223. In addition to Campbell's testimony, the jury also heard testimony regarding the observations of the detectives during the search warrant. This included, the admission of a picture of the digital scale found in

Mickens' room with the methamphetamine and folded $20 bill inside. RP (11/13/15) at 44; Exhibit 11.

Mickens called Dustin Bailey as a witness; Bailey testified that while he had been in the jail with Campbell, Campbell had told him he could work for the task force to get out of jail. RP (11/13/15) at 150-51. Bailey claimed Campbell told him that he had set up Mickens using "dope planted in the house." RP (11/13/15) at 151. During cross examination, Bailey admitted that working for the task force was risky and dangerous. RP (11/13/15) at 155. Bailey agreed that were he to work for the task force, he would not want people in the jail to know. RP (11/13/15) at 155. Bailey also agreed that people who did so were known as snitches. RP (11/13/15) at 155. And, Bailey admitted that while he was in the jail he was in contact with Mickens. RP (11/13/15) at 156.

When the court instructed the jury, it explained that it was the jury's duty to decide the case based solely on the evidence presented. RP (11/13/15) at 161; CP at 13. The court instructed the jury that it was not to consider evidence that was not admitted or stricken. RP (11/13/15) at 161-62; CP at 13. The court also instructed the jury, that the "lawyers' statements are not evidence" and to disregard any remark, statement or argument that was not supported by the evidence or the law in the court's instructions. RP (11/13/15) at 163; CP at 14. The court instructed the jury

on reasonable doubt by using the language of WPIC 4.01. RP (11/13/15) at 165-64; CP at 17.

During closing argument, the prosecutor stated that when police entered the house announcing search warrant and ordered those inside to "Show me your hands," Mickens came out holding a crowbar. RP (11/13/15) at 179. When the prosecutor argued that this evidence may have indicated that Mickens initially thought about "trying to get away," Mickens' attorney objected. RP (11/13/15) at 179. The court sustained the objection and instructed the jury to disregard the statement. RP (11/13/15) at 179.

During his closing argument, Mickens' attorney used the "abiding belief in the truth of the charge" language from the reasonable doubt jury instruction, to argue the evidence was insufficient for the jury to find Mickens guilty. RP (11/13/15) at 207-09. Mickens' attorney also argued that the police "don't trust" confidential informants. RP (11/13/15) at 200. He then spent the majority of his closing argument attacking the reliability of Mr. Campbell. RP (11/13/15) at 200-07. During rebuttal, the prosecutor responded to this argument by pointing out that the detectives never testified that they did not trust Campbell. RP (11/13/15) at 217. Then using the fact elicited that Campbell had been working for the task force for 13 years as a confidential informant, the prosecutor argued that

from this evidence the jury could infer that police had found him reliable. RP (11/13/15) at 217. The jury found Mickens guilty as charged. RP (11/13/15) at 228-29.

IV. ARGUMENT

A. MICKENS MAY NOT CHALLENGE THE JURISDICTION OF THE JUDGE PRO TEMPORE WHEN HE AGREED TO HAVE HIS TRIAL HEARD BY JUDGE STONIER, WHO TOOK AN OATH AND WAS APPOINTED BY THE SUPERIOR COURT TO SERVE AS A JUDGE PRO TEMPORE.

This Court should refuse to review Mickens' claim of lack of jurisdiction because he agreed to have his case heard by the judge pro tempore; further, because Judge Stonier was properly sworn and appointed to serve as judge pro tempore, Mickens' claim fails on its merits. "A case in the superior court of any county may be tried by a judge pro tempore, who must be ... [a] member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the case[.]" RCW 2.08.180. Both the State and Mickens agreed to have Judge Stonier preside over Mickens' trial. CP at 64. Now for the first time on appeal, Mickens challenges the jurisdiction of the trial court. While RAP 2.5(a) permits a party to raise a claim of lack of trial court jurisdiction for the first time on appeal, an appellate court may still refuse to review any claim of error which was not raised in the trial court.

RAP 2.5(a). This rule requires parties to bring purported errors to the trial court's attention, thus allowing the trial court to correct them. See *State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975).

A defendant who appears and tries his cause before a judge pro tempore without objection may not later challenge the appointment of the judge pro tempore. *State ex rel. Cougill v. Sachs*, 3 Wn. 691, 693-94, 29 P. 446 (1892). The essential element to the valid appointment of a judge pro tempore is the consent of the parties. *National Bank of Wash. v. McCrillis*, 15 Wn.2d 345, 357, 130 P.2d 901 (1942). Although RCW 2.08.180 requires parties agree to a judge pro tempore in writing, "[a] party who consents to the appointment of a judge pro tempore orally in open court cannot later claim the absence of written consent invalidates the appointment." *State v. Belgarde*, 119 Wn.2d 711, 718, 837 P.2d 599 (1992) (citing *Sachs*, 3 Wn. at 694).

Here, because Mickens agreed to have Judge Stonier hear his case as a judge pro tempore, the Court should refuse to consider his claim. As in *Sachs*, Mickens should not be able to agree to a judge pro tempore and then later challenge the appointment of that judge pro tempore for the first time on appeal. Mickens claim also fails on the merits. Judge Stonier swore an oath to support the constitutions of the United States and the State of Washington and to faithfully discharge his duties as a judge pro

tempore to the best of his ability. CP at 66. On this basis the Superior Court entered an order directing Judge Stonier to sit as a judge pro tempore in cases the court directs and the parties approve. CP at 67. The Superior Court scheduled the case for trial in front of Judge Stonier and both the prosecutor and Mickens' attorney signed an agreement to have the case be heard by Judge Stonier as a judge pro tempore. CP at 64. Also, Judge Stonier conducted a colloquy of Mickens himself, to make sure Mickens consented to having the case heard by Judge Stonier as a judge pro tempore. RP (11/12/15) at 3-4. Mickens affirmed orally that he agreed to have Judge Stonier hear his case. RP (11/12/15) at 3-4. Because the parties agreed in writing to have Judge Stonier hear the case as a judge pro tempore, and he was properly sworn and approved by the court to hear Mickens' case, Mickens jurisdictional claim fails.

B. BECAUSE MICKENS DID NOT OBJECT TO THE PROSECUTOR'S STATEMENT REBUTTING HIS ATTORNEY'S CLAIM DURING CLOSING ARGUMENT, HIS CLAIM OF MISCONDUCT WAS WAIVED.

Mickens waived his claim of prosecutor misconduct when he did not object to the prosecutor's rebuttal of his attorney's closing argument. "[T]he prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." *State v. Russell*, 125 Wn.2d 24, 87, 882 p.2d 747 (1994) (citing *United States v. Hiett*, 581 F.2d 1199, 1204 (5th

Cir. 1978)). Although Mickens did not object to the prosecutor's rebuttal argument, he now raises a claim of prosecutor misconduct for the first time on appeal. Because the prosecutor's remarks were not improper, much less so flagrant and ill-intentioned that they resulted in enduring prejudice that could not have been cured by an admonition to the jury, Mickens' claim of misconduct fails.

"A defendant's failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error, unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)). With all claims of misconduct, "the defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial." *Id.* at 718 (citing *State v. Mak,* 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Luvene,* 127 Wash.2d 690, 701, 903 P.2d 960 (1995)). The court reviews the effect of allegedly improper comments not in isolation, but in the context of the total argument and the issues in the case. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Even if it is shown that the conduct was improper, "prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a

substantial likelihood the misconduct affected the jury's verdict." *Stenson*, 132 Wn.2d at 718-19.

If the defendant objects at trial, to prove prosecutorial misconduct, the defendant must first establish that the question posed by the prosecutor was improper. *Id.* at 722 (citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). However, when the defendant fails to object, a heightened standard of review applies: "[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). (citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. York*, 50 Wn.App. 446, 458-59, 749 P.2d 683 (1987)). The wisdom underlying this rule is so that a party may not "remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal." *State v. Bebb*, 44 Wn.App. 803, 806, 723 P.2d 512 (1986); *see also Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960) ("If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.").

"Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect." *Russell*, 125 Wn.2d at 85. If a defendant—who did not object at trial—can establish that misconduct occurred, then he or she must also show that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (citation omitted); *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704 (2012). Under this heightened standard, "[r]eviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762; *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) ("Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request."). Importantly, "[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (citations omitted).

Of course, "[i]n closing argument a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence." *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.3d 1105 (1995). When a prosecutor does no more than argue facts in evidence or suggest reasonable inferences from the evidence there is no misconduct. *See State v. Smith*, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985). Any allegedly improper statements by the State in closing argument "should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.2d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Juries are presumed to follow jury instructions absent evidence to contrary. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)).

Further, a prosecutor's remarks in rebuttal, even if they would otherwise be improper, are not misconduct if they were "invited, provoked, or occasioned" by defense counsel's closing argument, so long as the remarks do not go beyond a fair reply and are not unfairly prejudicial. *State v. Davenport,* 100 Wn.2d 757, 761, 675 P.2d 1213 (1984) (quoting *State v. LaPorte,* 58 Wn.2d 816, 822, 365 P.2d 24 (1961)). "When a defendant advances a theory exculpating him, the

theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." *State v. Contreras*, 57 Wn.App. 471, 476, 788 P.2d 1114 (1990). Although a prosecutor may not shift the burden of proof to the defendant, *see, e.g., In re Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012), a prosecutor's "remarks even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements. . . ." *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1005 (1995) (citing *State v. Russell*, 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994)). Arguing that facts indicate a witness is truthful is not misconduct. *State v. Fiallo-Lopez*, 78 Wn.App. 717, 730, 899 P.2d 1294 (1995). Even strong "editorial comments" by a prosecutor are not improper if they are in response to arguments made by the defendant. *State v. Brown,* 132 Wn.2d 529, 566, 940 P.2d 546 (1997).

Here, during his closing argument, Mickens' attorney argued that the police "don't trust" confidential informants. RP (11/13/15) at 200. He then spent the majority of his closing argument attacking the reliability of Mr. Campbell. RP (11/13/15) at 200-07. In rebuttal the prosecutor responded directly with evidence from the case. Fist, the prosecutor pointed out that the detectives never testified that they did not trust

Campbell. RP (11/13/15) at 217. Then, using a fact that had been elicited, that Campbell had worked for the police for thirteen years as a confidential informant, the prosecutor argued that from this evidence the jury could infer that the police found him reliable. RP (11/13/15) at 217. Thus, the prosecutor did not "vouch" for the credibility of the witness, but used the evidence to counter the defense argument during rebuttal. It was Mickens' attorney who raised the issue of whether the police trusted Campbell, based on general assertions about informants. After Mickens' attorney suggested that Campbell was distrusted by the police based on generalized claims about confidential informants, the prosecutor was entitled to use evidence to counter this claim. It was reasonable for the jury to infer that the police did not distrust Campbell, as Mickens' attorney had argued, when he had successfully worked for the police for thirteen years as a confidential informant. Accordingly, the prosecutor's argument was proper, and this was evident to Mickens' attorney who did not object.

Further, there is no showing that the prosecutor's statement was flagrant or ill-intentioned. Rather it was made in response to a defense argument during closing, it referenced facts that were in evidence, and it was the only such statement that was made during closing argument. Not only did the prosecutor's rebuttal closely track the claims Mickens' attorney had made during his closing, but the thrust of the prosecutor's

argument was on the corroborating evidence that existed. This included, most significantly, the scale found in Mickens' room that was had both methamphetamine and a $20 bill inside it. RP (11/13/15) at 216, 217-18; CP at Exhibit 11. Because a prosecutor is expected to argue based on facts in evidence and to respond to arguments raised by defense counsel, and this is what occurred here, the record fails to support a finding that the prosecutor's statement was flagrant or ill-intentioned.

Because Mickens did not object, to prevail, he must also show both that no curative instruction could have cured any prejudice and that there was resulting prejudice that had a substantial likelihood of affecting the jury verdict. Mickens' attorney's decision not to object at trial suggests that the prosecutor's rebuttal statement did not appear critically prejudicial in the context of the trial. Had an objection to the statement been sustained, the court could easily have instructed the jury to disregard the prosecutor's statement. Because jurors are presumed to follow the court's instructions and the statement was brief and isolated, there is no reason to conclude such an instruction would not have been effective here, had it been necessary.

Moreover, there is not a substantial likelihood that this statement affected the jury verdict. The evidence located in Mickens' room—a scale with methamphetamine and a $20 bill inside it—strongly corroborated

Campbell's claim to having purchased methamphetamine from Mickens. Thus, there is not a substantial likelihood that the jury's verdict would have been any different, had the prosecutor not made the statement complained of here for the first time on appeal. Mickens claim of misconduct was therefore waived.[1]

C. MICKENS DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

Mickens' attorney cannot be deemed ineffective for not bringing a motion to exclude evidence, when he did bring such a motion. "[W]here the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted." *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998) (internal citations omitted). Mickens' claim that his attorney was ineffective for not moving in limine to exclude the fact that he exited his room with the crowbar, ignores the fact that his attorney

[1] Mickens also argues his attorney was ineffective for not objecting the prosecutor's remark, however because the prosecutor's argument was in response to an argument Mickens' attorney had made and was a reasonable inference drawn from the evidence an objection would have been overruled. Further, there is no showing that this evidence impacted the outcome of the trial. Therefore, this claim of ineffective assistance is subsumed by the failure of Mickens' claim of misconduct.

actually did move to exclude this evidence. RP (11/13/15) at 135. Thus, Mickens' claim is not supported by the record. Additionally, there was a legitimate tactical reason for Mickens' attorney to admit this evidence—as he chose to do at trial, and the result of the trial would not have been any different had the evidence not been admitted.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 335.

Whether counsel is effective is determined by the following test: "[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302 (1978) (*citing State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, "[t]his test

places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby." *Id.* at 263. The first prong of this two-part test requires the defendant to show "that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) (*citing State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122, *review denied*, 105 Wn.2d 1013 (1986)). The second prong requires the defendant to show "there is a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different." *Id.* at 173.

"[T]here is no ineffectiveness if a challenge to the admissibility of evidence would have failed[.]" *State v. Nichols*, 161 Wn.2d 1, 14-15, 162 P.3d 1122 (2007) (citing *State v. G.M.V.*, 135 Wn.App. 366, 372, 144 P.3d 358 (2006)). "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." *State v. McNeal*, 145 Wn.App. 352, 362, 37 P.3d 280 (2002). The appellate court should strongly presume that defense counsel's conduct constituted sound trial strategy. *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000). Trial counsel has "wide latitude in making tactical decisions." *State v.*

Sardinia, 42 Wn.App. 533, 542, 713 P.2d 122 (1986). "Such decisions, though perhaps viewed as wrong by others, do not amount to ineffective assistance of counsel." *Id.* (citing *Strickland v. Washington*, 446 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984)). Of course, if trial counsel would not have succeeded in a course of action a defendant claims should have been taken at trial, it cannot form the basis of an ineffective assistance claim. *See Nichols*, 161 Wn.2d at 14-15. With regard to the second prong of the *Strickland* test: "Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *Nichols*, 161 Wn.2d at 8 (citing *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

To show that a failure to object caused counsel to be ineffective the defendant has the burden of showing that "not objecting fell below prevailing professional norms, that the proposed objection would have been sustained, and that the result of the trial would have been different if the evidence had not been admitted." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). "The decision of when or whether to object is a classic example of trial tactics." *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (1989). Courts presume that "the failure to object was the product of legitimate trial strategy or tactics, and the onus is on

the defendant to rebut this presumption." *State v Johnston*, 143 Wn.App. 1, 20, 177 P.3d 1127 (2007). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Madison*, 53 Wn.App. at 763. However, these cases all presuppose that counsel did not object to the evidence at issue.

Here, Mickens' attorney chose to elicit evidence of the crowbar to demonstrate an inconsistency between the detectives' observations and Detective Brown's report. RP (11/13/15) at 89. This was a legitimate tactical decision to challenge Detective Brown's credibility. After introducing the evidence, Mickens' attorney then attempted to exclude it. RP (11/13/15) at 135. Because Mickens had already put who was the holding the crowbar at issue, the State was permitted to elicit this fact. RP (11/13/15) at 138, 144. However, due to Mickens' attorney's motion to exclude the evidence, the court refused to permit the State to elicit that he had raised the crowbar in a threatening manner. RP (11/13/15) at 138. Then later when the prosecutor argued in closing that the crowbar was evidence Mickens contemplated escape, the court sustained Mickens' attorney's objection and told the jury to disregard the prosecutor's argument that Mickens' considered using the crowbar to get away. RP (11/13/15) at 179. Thus, not only was Mickens' attorney able to use

evidence of the crowbar to impeach Detective Brown's testimony, but he also prevented the State from arguing the crowbar was evidence of consciousness of guilt. While no attorney can predict with absolute certainty how a court will rule, Mickens' attorney's decisions permitted him to use this evidence as a sword, while shielding him from any attempt by the State to do so. Not only did this demonstrate a legitimate trial strategy, but also an advanced litigation skill that even the most seasoned defense attorneys would have difficulty achieving. Thus, because there was a legitimate trial strategy for eliciting the evidence while limiting its use—as Mickens' attorney did, he was not ineffective. Further, because his attorney brought a motion to exclude the evidence before the State introduced it, his claim that his attorney did not move to exclude this evidence is incorrect.

Mickens also did not suffer any prejudice as a result of his attorney's actions. The evidence admitted was that Mickens was holding a crowbar. No argument was permitted that Mickens used the crowbar to

escape or in an assaultive manner. The prosecutor's opening statement was not evidence.[2] Further, the jury was instructed it was not to consider evidence that was not admitted or stricken, that the lawyers' statements were not evidence, and to disregard any statement or remark not supported by the evidence. CP at 13-15. Because the jury is presumed to follow the court's instructions, and no evidence beyond the fact of Mickens holding the crowbar was admitted, he suffered no prejudice. Of course, whether or not he held a crowbar was of little consequence to the issues in the case, as the real issue involved whether or not he had delivered methamphetamine to Campbell or possessed the drugs found in his room. Considering the digital scale in his room had both methamphetamine and a $20 bill on it, the result of the trial would have been the same, regardless of whether or not the jury heard about the crowbar. Thus, because Mickens' attorney actually did move to exclude the evidence, there was a legitimate tactical reason to introduce it, and he suffered no prejudice, Mickens' claim of ineffective assistance fails.

[2] The trial court's limitation on the evidence was surprising considering that Mickens exited the room with the crowbar raised above his head in a threatening manner only after the police announced their presence, entered the house, and gave multiple commands for the occupants to show their hands. This evidence was obviously relevant to showing consciousness of guilt. While the court's decision was not unreasonable, another court viewing the same evidence could have determined that its probative value outweighed any unfair prejudice.

D. BECAUSE MICKENS DID NOT OBJECT TO THE JURY INSTRUCTION DEFINING REASONABLE DOUBT, HIS CLAIM IS WAIVED.

Mickens did not object to the jury instruction defining reasonable doubt, therefore he may not challenge this instruction for the first time on appeal. In 2007, the Washington Supreme Court instructed all Washington State trial courts as follows: "We also exercise our inherent supervisory power to instruct Washington trial courts to use only the approved pattern instruction WPIC 4.01 to instruct juries that the government has the burden of proving every element of the crime beyond a reasonable doubt." *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). The trial court abided by this Supreme Court directive when it instructed the jury on the burden of proof by using WPIC 4.01. Mickens did not object to this instruction being given. RP (11/13/15) at 160. Because he did not object to the issue at trial he waived the issue, unless he can show manifest error affecting a constitutional right.[3] RAP 2.5(a).

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[3] Often when cases involve a jury instruction challenged on appeal, the invited error doctrine will apply: "[E]ven where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording." *State v. Winings*, 126 Wn.App. 75, 89, 107 P.3d 141 (2005). Because Mickens did not propose the jury instruction at issue, the invited error doctrine does not apply. *See State v. Corn*, 95 Wn.App. 41, 56, 975 P.2d 520 (1999). However, when the court addressed the jury instructions with the parties, Mickens neither objected nor took exception to the instruction. By permitting the jury instruction to go forward, Mickens achieved exactly what the invited error doctrine is intended to prevent: He did not raise the issue when given the opportunity at trial, then, after being convicted, he raised the issue for the first time on appeal in an attempt to obtain a new trial, denying the

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002) (citing *State v. Riley*, 137 Wn.2d 904, 908 n. 1, 909, 976 P.2d 624 (1999)). When considering a jury instruction challenge, the appellate court reviews the instructions as a whole. *State v. Embry*, 171 Wn.App. 714, 756, 287 P.3d 648 (2012) (citing *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)). "Generally, an appellant cannot raise an issue relating to alleged jury instructions for the first time on appeal unless it is a 'manifest error affecting a constitutional right.'" *Id.* (citing RAP 2.5(a)). Jury instruction errors are not automatically constitutional in magnitude. *Id.* (citing *State v. Scott*, 110 Wn.2d 682, 691, 757 P.2d 492 (1988)).

"Instructions satisfy the requirement of a fair trial when, taken as a whole they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case." *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999) (citing *State v. Theroff*, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980)). "[A]n issue, theory, or argument not presented at trial will not be considered on appeal." *State*

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trial court the opportunity to address the issue at the appropriate time. *See State v. Schaler*, 169 Wn.2d 274, 303, 236 P.3d 858 (2010) (J.M. Johnson, J., *dissenting*).

v. Jamison, 25 Wn.App. 68, 75, 604 P.2d 1017 (1979) (quoting *Herberg v. Swartz*, 89 Wn.2d 916, 578 P.2d 17 (1978)). Under RAP 2.5(a), an appellate court "may refuse to review any claim of error which was not raised in the trial court."

In *Bennett*, the Supreme Court explained its approval of WPIC 4.01 because it allows both parties to argue their theory of the case. 161 Wn.2d at 317. The Court also recognized the temptation to expand the definition "where creative defenses are raised." *Id.* But the Court explained that an effort to improve or enhance the standard approved instruction "necessarily introduces new concepts, undefined terms and shifts, perhaps ever so slightly, the emphasis of the instruction." *Id.* The Court stated: "[I]nnocence is simply too fundamental, too central to the core foundation of our justice system not to require adherence to a clear, simple, accepted and uniform instruction." *Id.* at 318. The Court then concluded that sound judicial practice required WPIC 4.01 to be given and instructed all state trial courts to do so. *Id.* While the Supreme Court did not specifically address the issue Mickens raises with this instruction, it surely would not have mandated the use of this instruction if it was unconstitutional.

Here, Mickens did not suffer a manifest error affecting a constitutional right, when the court instructed the jury in accordance with

the Supreme Court's mandate in *Bennett*. Mickens fails to consider the instruction as a whole and instead focuses only on part of the language. In doing so, Mickens misapplies *State v. Emery*, 174 Wn.2d 741, 760 278 P.3d 653 (2012). While the jury's role is not simply to determine the truth of what occurred, but to determine whether a charge has been proved beyond a reasonable doubt, it would be dangerous to completely divorce a concern for the truth from the jury's consideration. By making an "abiding belief in the truth of the charge" a requirement for being satisfied beyond a reasonable doubt, the court avoids the risk of a juror, who doubts the truth of the evidence but is unable to articulate a reason, from believing he or she is compelled to convict.

Not only did Mickens not object to the instruction, but his attorney extensively used the "abiding belief in the truth of the charge" language during closing argument to argue against Mickens' guilt. RP (11/13/15) at 207-09. While this did not persuade the jury, it demonstrates that this language is useful to a defendant when questions are raised as to the truthfulness of the State's witnesses. Thus, not only was the instruction properly given, but it was used to Mickens' benefit. Because the jury was properly instructed and Mickens has not shown that he suffered a manifest error affecting a constitutional right, he waived this issue when he did not object at trial.

E. BECAUSE THE STATE HAS NOT SOUGHT APPELLATE COSTS, THE ISSUE IS NOT CURRENTLY BEFORE THIS COURT.

Because the State has not attempted to recoup appellate costs in this case, the appellate cost issue raised in Mickens' brief is not ripe for review at this time. "[A]ny constitutional issues that might be raised with regard to penalties imposed are not presently ripe for review. It is only when the State attempts to collect ... payment ordered by the trial court that such issues may arise." *State v. Phillips*, 65 Wn.App. 239, 244, 828 P.2d 42 (1992). RCW 10.73.160 permits the court to require a person convicted of a crime to bear the responsibility of paying his or her appellate costs. Prior to an award of appellate costs being ordered, two things must occur. First, because the statutory provision authorizing recoupment of appellate costs requires a conviction, a conviction must first be affirmed. *See* RCW 10.73.160(1). Second, the State must request the award of appellate costs according to the rules of appellate procedure. *See* RCW 10.73.160(3); RAP 14.

It is well-settled that the relevant time to address the issue of payment of costs is at "the point of collection and when sanctions are sought for nonpayment." *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). In *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015), the Supreme Court ruled that the trial court erred by imposing

legal financial obligations without conducting an inquiry into the defendant's ability to pay. Subsequently, Division One of the Court of Appeals refused to award appellate costs that were sought by the State when the record caused the court to conclude the indigent appellant's financial condition was not likely to improve. *State v. Sinclair*, 192 Wn.App. 380, 393, 367 P.3d 612 (2016).

Here, unlike *Sinclair*, the State has not sought appellate costs. There is no need to conduct an inquiry into Mickens' ability to pay unless the State attempts to recoup appellate costs. Should the State later seek an order for recoupment of appellate costs, then Mickens would be permitted to oppose them at that time. However, until such time as the award of these costs is sought, his argument regarding appellate costs should not be considered.

V. CONCLUSION

For the above stated reasons, Mickens' convictions should be affirmed.

Respectfully submitted this 30th day of September, 2016.

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on September 30th, 2016.

-/Michelle Sasser/-

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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